No. 02-548

(3)

In The

Supreme Court of the United States

CZARINA, L.L.C.,

Petitioner,

v.

KEMPER DE MEXICO, COMPANIA DE SEGUROS, S.A., f/k/a SEGUROS LA TERRITORIAL, S.A.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF IN REPLY

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REPLY OF PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

I. Respondent's Opposition To The Petition Raises False Issues And Misstates The Facts And The Law.

Respondent has managed to build, from the rules governing enforcement of judgments and minimum contacts, an almost impenetrable tangle of misstatements of the record and of the law, in an attempt to create the impression that this is a simple case of disputed facts and state law, unsuitable for certiorari. Before this Court can even begin to address the real issues in this case, these false ones must be excised. As instructed by Rule 15 of this Court, we will first "address" the "mistatement[s] of fact and law . . . that bear[ ] on what issues properly would be before the Court if certiorari were granted."

A. Respondent's Description Of The Second Action Consolidated Here Is Misleading, And Disguises Its Application Of The Wrong Statute Of Limitations.

Respondent has misrepresented the character of the actions below in a way that directly affects the rules of decision. Respondent contends that what it calls the "Enforcement Action" (the second-filed proceeding, case number 99-57013) is governed by Cal. Code Civ. Proc. § 683.020, which imposes a 10-year, non-tollable limitations period for California judgments. If Respondent were right about the character of the second-filed proceeding, the application of the appropriate statute of limitations would be simple. But § 683.020 applies to proceedings for the enforcement and renewal of judgments. This is an action *on* a judgment. The older remedy of an action "on" a

judgment, governed by the tollable limitations period of § 337.5, is expressly preserved in California law. Cal. Code Civ. Proc. § 683.050. *See, Pratali v. Gates*, 5 Cal. Rptr. 2d 733 (Cal. Ct. App. 1992). In case there is any doubt about the character of proceeding No. 99-57013, a copy of the Complaint is included in the supplemental appendix. (App. Supp. P. 1). The 9th Circuit properly did not apply § 683.020, nor did Respondent urge it below.

B. California's Tolling Law Is Neither Obsolete Or Invalid.

Respondent's assertion that the court below "properly held" the tolling rules inapplicable because of the California state courts' incremental limitations on their scope simply misrepresents the holding below. The court of appeal, on rehearing, was succinct. It held that the tolling rules were inapplicable because Petitioner did not explain why it had not effected service under the Inter-American Convention. It never made, or even suggested, the repealer by inference attributed to it by Respondent, nor was it raised at any time below.

In fact, § 351 is very much alive. The cases cited by Respondent, without exception, involved defendants who, though out of the jurisdiction, could have been effectively served. *Bigelow v. Smik*, 85 Cal. Rptr. 613 (Cal. Ct. App. 1970) (non-resident motorist servable through state official); *Epstein v. Frank*, 177 Cal. Rptr. 831 (Cal. Ct. App. 1981) (California partnership amenable to service although partners out of state.) And there are many other cases where state and federal courts in California have applied § 351 to an absent defendant. *Pratali v. Gates*, 5 Cal. Rptr. 2nd 733, 4 Cal. App. 4th 632 (1992); *National*

Union Fire Ins. Co. v. Owenby, No. 00-55909, 2002 U.S. App. LEXIS 14610 (9th Cir. July 15, 2002). We are aware of no case in which a California court has denied tolling where the defendant was truly out of reach.

This case represents a classic example of the harm tolling statutes are meant to prevent. Even today, with the benefit of modern notions of substituted service and light-speed communication, such rules have a proper role, because it remains possible for debtors to wrongfully avoid their creditors. If due process constrains the application of tolling rules to foreign corporations, it also constrains their access to the protection of statutes of limitations. California has a right to insist that no debtor claim the protection of statutes of limitation while avoiding its jurisdiction. Respondent had no connection at all with California until 1995, and the Inter-American Convention did not create one. Neither fairness, nor logic, nor tradition demands that California reject the valid judgment of a sister state by applying its statutes of limitation while ignoring their tolling component.

C. Whether Or Not The District Court Could Have Registered The New York Judgment When It Lacked Personal Jurisdiction Over The Respondent, It Could Not Have Decided Petitioner's Second Action, On The New York Judgment Unless Respondent Put Itself Within The Authority Of The Court.

In this proceeding, Respondent introduces for the first time the theory that personal jurisdiction is not necessary to register a judgment. Brief in Opposition at 12. Nothing in the pleadings in the district courts or the court of

appeals raised, or even suggested, this issue. Nothing in any of the opinions below addressed it. This Court should not consider it now.[1] *Laun v. United States*, 355 U.S. 339 (1958).

But even aside from this difficulty, Respondent's argument is unsupportable. No California court, state or federal, has ever held that a judgment may be registered against a defendant without suitable contacts with the jurisdiction. On the other hand, both state and federal courts have applied tolling rules based on the absence of the defendant to actions on judgments. Since the justification for tolling against absent defendants derives substantially from the difficulty in obtaining effective service over them, an obstacle which is only bothersome if personal or *in rem* jurisdiction is necessary to registration, it is the obvious, though unstated, assumption of the federal courts that jurisdiction is necessary to registration of a judgment. The 9th Circuit, when it considered the nature of 28 U.S.C. § 1963 in a somewhat different context, held that a proceeding under § 1963 is really just a surrogate for a "full-blown action on a judgment." *Marx v. Go Publishing*, 721 F.2d 1272 (9th Cir. 1983). The consequence of that holding was that it applied § 337.5, and not § 683.020, to

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[1] Seeking to avoid this rule, Respondent claims that the theory was "implicit" in the arguments Respondent raised in the district courts. Respondent has not explained which of its arguments this new one was "implicit" in. Argument in both the trial and appellate courts centered around the availability of service under various California statutes (and, almost as an afterthought, the Convention,) and whether § 351 applied to foreign corporations. See, the court of appeals' initial decision and Judge Rymer's dissent, App. 10-14, Judge Rawlinson's dissent to the opinion on rehearing, App. 6-7, and Judge Huff's analysis in the trial court, App. 19-25.

registrations. There is only one difference of substance between the two provisions – the former permits tolling and the latter does not. If a "full blown action on a judgment" demands personal jurisdiction over the debtor, then an action under § 1963 does, too.

Respondent's argument that no jurisdictional basis is needed for registration of a judgment is supported by essentially no precedent and absolutely no logic. Respondent relies on a footnote in *Shaffer v. Heitner*, 433 U.S. 186 (1977) for its argument that enforcement of a judgment may take place in a court with which the debtor lacks minimum contacts. But the case really stands for the proposition that minimum contacts are required even when a court asserts *in rem* jurisdiction, and the footnote cited by Respondent actually affirms that the debtor must, at least, possess property within the jurisdiction before enforcement may be sought there. The analysis of the point in the solitary district court case on which it relies, *Dichter v. Disco*, 606 F. Supp. 721 (S.D. Ohio 1984), is a single sentence long and consists of an *ipse dixit* statement that contacts are not required.

Even if Respondent could defeat the "Registration Action" on limitations grounds, it would inevitably succumb to the action on the judgment that Petitioner filed next. An "action on a judgment" is simply a new lawsuit. It is commenced in the usual way with the filing of a complaint and the service of process on the defendant. California law provides that the limitations period governing it is tollable. Cal. Code Civ. Proc. § 683.050. *Pratali v. Gates*, 5 Cal. Rptr. 2d 733 (Cal. Ct. App. 1992) is one of a number of California cases reversing the dismissal of actions on judgments based on tolling of the statute of limitations due to the defendant's absence from the jurisdiction. Since

the same California court has long since recognized the direct connection between the justification for tolling over absent defendants and the expected difficulty of effectively serving them, *Bigelow v. Smik*, 85 Cal. Rptr. 613 (Cal. Ct. App. 1970), it is plain that an action on a judgment in California does, indeed, require that the defendant be both served and amenable to service. *Id.* at 639.

In an unpublished case decided less than two months after this one, a different panel of the same Circuit[2] confirmed that an "independent action" and a "judge with proper jurisdiction" were the principal requirements of an action on a foreign judgment under California law, and that the "ten-year tollable" period provided by § 337.5, and not either § 683.020 or § 1710.55 (for registration of out of state judgments) was applicable. *National Union Fire Ins. Co. v. Owenby*, No. 00-55909, 2002 U.S. App. LEXIS 14610 (9th Cir. July 15, 2002).

> In both California and federal district courts, an out of state judgment holder who wishes to enforce that judgment in state may bring a so-called action on a judgment to do so. . . . An action on a judgment is the "customary way" to secure enforcement of an out of state judgment. . . . California has placed no particular limits on what may qualify for an action on a judgment beyond the inherent requirements of prosecution in an independent lawsuit and the fact that the process must necessarily involve a judge with proper

[2] The National Union Fire panel included Judge Rawlinson, dissenter here.

> jurisdiction who issues a judgment recognizing the validity of an out of state judgment.

Id. at 8-10 (*citations omitted).* Judge Rawlinson, who dissented in the instant case, had, in *Owenby* the support of a panel which correctly identified the elements of an action on a judgment: an independent lawsuit and proper jurisdiction. Although in that case the action on the judgment was filed just within the ten-year period, the court noted that the applicable limitations period was "tollable," so that it could have been tolled if the facts had called for it. *Id.* at 11.

The owner of a California judgment is entitled to suspend his enforcement and renewal efforts while the debtor is out of the jurisdiction, and then pursue him when he returns, unencumbered by the need for decennial renewals, by bringing an action on the old judgment. Full faith and credit demands that the courts offer the same useful protection to the owner of a New York judgment.

D. Respondent Misstates The Record Below In Two Additional Respects.

Respondent makes several attempts to rewrite the record below, without bothering to support its assertions with documentation. Seeking to excuse the appellate court's mistake in blaming Petitioner for the lack of "evidence" supporting its claim that Respondent was outside the reach of process under the Inter-American Convention (plain error, given that the case was decided at the pleadings stage), Respondent claims that the court of appeals was "clearly referring to the factual allegations of [Petitioner's] pleadings." Brief in Opposition at 11, fn. 5. The suggestion is that there was some ambiguity in

Petitioner's allegations concerning Respondent's absence. However, the trial court set out its understanding of the pleadings, and there is no ambiguity apparent: "Czarina claims that Territorial is a Mexican Corporation with no facilities in the United States and that Territorial has not been within the state of California at any time after the New York Judgment was entered in 1984 [until it appointed an agent there in 1995]. App. at 23. The 9th Circuit's attempt to deny Petitioner the opportunity to prove its allegations was indefensible; Respondent's invention of a non-existent ambiguity in the "factual allegations" does not cure it.

Respondent's second effort to revise history is, to those familiar with the events leading up to this litigation, worse. Respondent asserts, without any record support whatsoever, that, "the real problem here, . . . is that [Petitioner's predecessor in title] did not act with any reasonable diligence to ensure future collectibility of the 1984 default judgment, so that what it sold to Czarina in 1998 had very little value." Brief in Opposition at 17. Respondent does not point to a single action that could have been taken by Halvanon, its Liquidator, or the Petitioner in the exercise of "reasonable diligence" that would have been of the slightest bit of help, since it is common ground that Respondent avoided the country altogether for over eleven years. Respondent appeared in, and began to defend, Halvanon's action against it in 1983. But shortly thereafter, apparently impressed by the size of the obligations to which its agents had committed it, Respondent absconded from both the U.S. and European insurance markets. *See,* Petition at 4. It left not only Halvanon, but hundreds of frustrated creditors gnashing their teeth. Although Respondent's disappearing act has

long been a source of outrage throughout the markets for international reinsurance, the veil which Respondent drew over itself and its assets has been proof against almost every effort at collection, not only by Halvanon and its liquidators, but by similarly situated creditors around the world. Respondent's suggestion that "reasonable diligence" by Halvanon would have effected collection is not only unsupported by any citation to this record, it is false.[3]

II. Nothing In Respondent's Arguments Eliminates The Need For Certiorari To Address The Important Questions Raised By Petitioner.

In its Petition, Czarina pointed to two questions demanding the intervention of this Court. The first was the 9th Circuit's refusal to recognize the constitutionally significant difference between the availability of substituted service and the presence of minimum contacts, as well as its misapplication of the Inter-American Convention,

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[3] Respondent's notions of "reasonable diligence" are reflected in its statement that, rather than registering its judgment in every U.S. jurisdiction, Halvanon could have protected itself by registering in the "two or three other U.S. jurisdictions in which a Mexican insurer might reasonably be expected to do business ... California, Arizona, and Texas" is either unvarnished hindsight or regional chauvinism. Relations between U.S. and Mexican business are hardly limited to the border states. That Halvanon did not predict that Territorial, after retiring in disgrace from the New York markets for international reinsurance, would next venture to sell short-term auto insurance to unsuspecting motorists in San Diego, is no sign of lack of diligence. Ironically, ADA-VIS, the garnishee agent for the auto insurance sales, complains bitterly that Territorial is no better at paying the claims of those motorists today than it was in paying its debt to Halvanon twenty years ago. ADA-VIS was compelled to advance them the money itself. *See* App. at 17.

which has not yet been subject to the scrutiny of this Court. The second was the harmful limitation imposed on Full Faith and Credit and Equal Protection by the Circuit's refusal to give effect to a valid New York judgment. The Court should not be distracted by Respondent's inaccurate attempts to make this case appear to be a mere matter of muddled facts and state law. Petitioner's stated issues are still central to this case, and they remain important to our nation's courts as they mediate the many disputes and controversies that arise in the hurly burly of the international marketplace.

The confidence that United States courts can be relied upon to offer speedy, certain justice, fair to natives and foreigners alike and undistracted by procedural inconsistencies, is a critical reason both resident and non-resident entrepreneurs choose to conduct international commerce within our borders. To enhance that confidence, this Court should grant certiorari to decide the important issues raised by this Petition.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CZARINA, L.L.C.,	)	
Plaintiff,	)	**No. 99 CV 1578**
vs.	)	**R CGA**
SEGUROS LA TERRITORIAL S.A.	)	
Defendant.	)	

COMPLAINT

(Filed Jul. 28, 1999)

Czarina, L.L.C., complains against defendant as follows:

VENUE AND JURISDICTION

1. Plaintiff is a limited liability corporation organized and existing under the laws of the state of Delaware and having its principal place of business in New York. It brings this action as assignee of Halvanon Insurance Company, Ltd., a corporation formerly organized under the laws of Israel.

2. Defendant is a corporation organized under the laws of Mexico and having its principal place of business in Mexico City, Mexico.

3. The amount in controversy exceeds $75,000.

4. Venue in this district is proper because the Defendant is an alien corporation. It has been transacting business, without qualifying to do so, in this district for four years and possesses property located in this district, namely funds owed it by its duly appointed agent.

5. On February 7, 1984, the United States District Court for the Southern District of New York, having jurisdiction of the subject matter and the parties, entered a judgment in favor of Halvanon Insurance Co. and against various defendants, including Territorial, jointly and severally, in the amount of $961,405.83. Pursuant to New York law, the unpaid balance of the judgment accrued interest at the rate of 9% per annum. A copy of the Judgment is attached hereto as **Exhibit A**.

6. Halvanon received the sum of $125,000 in partial satisfaction of the said judgment. The remainder of the judgment remains unpaid.

7. Halvanon became the subject of winding-up proceedings pursuant to the insolvency laws of the United Kingdom and Israel. Philip J. Singer was appointed Joint Liquidator for Halvanon with authority to deal with the assets of Halvanon and distribute their proceeds to its creditors.

8. On May 14, 1998, by Deed of Assignment executed by its Joint Liquidator, Halvanon assigned all its right, title and interest in the said judgment to Plaintiff. A true copy of the Deed of Assignment is attached hereto as

Exhibit B. Notice of this assignment was furnished to Defendant on May 14, 1998. A copy of the notice is attached hereto as **Exhibit C**.

9. There is now due and owing to Czarina, as assignee of Halvanon, the principal sum of $836,405.83, together with interest thereon in the amount of $1,166,786.10 through August 4, 1999.

10. Between 1985 and approximately 1995, Defendant was not within the State of California. Since approximately 1995, Defendant has transacted business in the State of California, to wit the sale of insurance, through appointed agents located in California, covering risks incident to transportation in Mexico.

THE PLAINTIFF THEREFORE PRAYS this Court enter judgment in its favor and against Defendant in the amount of $836,405.83, plus interest thereon at 9% from February 7, 1984 to the date of judgment, plus his costs of suit, and award such other legal and equitable relief as the Court finds just.

CZARINA L.L.C.
By: /s/ Jessica Turner
One of its Attorneys

Dated: July 28, 1999